Supreme Court, U.S.
FILED
APR 10 1997
OFFICE OF THE CLERK

No. 96-1104

In The

Supreme Court of the United States

October Term, 1996

JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana,

Petitioner,

v.

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicians,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Petition presents the straightforward issue whether a state legislature may prohibit persons other than licensed physicians from performing abortions. Until the Court of Appeals' decision below, there existed no dispute over the States' discretion to impose such a limitation, since this Court had recognized that authority explicitly in *Roe v. Wade*, 410 U.S. 113, 165 (1972), *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 447 (1983). It is therefore perhaps unsurprising the Respondents devote only three pages to the question presented, instead focusing on the assertion that the Court's intervention now would be premature and on a lengthy, but for instant purposes immaterial, analysis of their claim under the Bill of Attainder Clause, U.S. Const. art. I, § 10. The Petitioners do not contest the proposition that this Court ordinarily refrains from entertaining issues except where a final judgment has entered. However, this is not an ordinary case; it is a paradigm of a lower federal court departing from a well-marked path in an area of exceptional public policy sensitivity. The Court of Appeals' error is one of law that should be rectified now rather than later to avoid unnecessary litigation over an issue long since resolved by this Court.

ARGUMENT

I. THE DECISION BELOW RAISES ONLY A QUESTION OF LAW THAT IS FUNDAMENTAL TO FURTHER LITIGATION OF THE RESPONDENTS' UNDUE BURDEN CLAIM AND THAT HAS BEEN DECIDED BY THIS AND EVERY OTHER COURT CONTRARY TO THE COURT OF APPEALS.

The Respondents argue that "[t]he lower court's rulings were made in the unique context of considering preliminary injunctive relief, which requires the courts to weigh a variety of legal and factual considerations and make hasty evaluations as to the nature and merit of the legal issues presented." Resp'ts Br. in Opp'n ("Opp'n") at 13. However accurate their characterization of the preliminary injunction process might be in other situations, the Court of Appeals' determination was neither hasty nor fact-bound. The court was concerned not with factual nuance but with the standard by which the Respondents' undue burden claim under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), was to be assessed. It thus found the District Court's analysis concerning the purpose of Mont. Code Ann. § 50-20-109(1)(a) (1995) "unduly confined" (Pet. App. 6a) and remanded for a factual assessment "of the totality of circumstances surrounding the enactment of [the physician-only requirement] [ ] and whether that statute in fact can be regarded as serving a legitimate health function" (*id.* 7a). The Court of Appeals itself made no factual findings. The heart of the opinion below is a purely legal determination that physician-only requirements like Montana's are not per se valid and that a searching

inquiry into legislative motivation, together with an evidentiary examination of the extent to which the physician-only restriction achieves its health-related objective, is mandated under *Casey's* undue burden test.

This Court has exercised its authority under 28 U.S.C. § 1254(1) to review rulings other than in connection with a final judgment "where [the ruling] is fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). The issue in *General Motors* was whether certain expenditures and losses could be recovered in addition to the actual fair rental value of property condemned by the United States; the district court had rejected an offer of proof by the plaintiff in that regard, but the court of appeals concluded the additional amounts were recoverable and remanded for trial over their amount. In *Gillespie* the question was whether the Jones Act, 46 U.S.C. § 688, provided the exclusive remedy with respect to claims arising from the death of a seaman – a question that arose in an interlocutory appeal from the district court's decision striking allegations from a complaint seeking recovery under state law wrongful death provisions. Consequently, in both cases issues whose determination could have awaited later certiorari proceedings following final determination of the cases were addressed because they were central to orderly and efficient resolution of the controversies and involved only questions of law otherwise warranting review. *See also Estelle v. Gamble*, 429 U.S. 97 (1976) (whether court of appeals properly reversed district court's judgment dismissing complaint for failure

to state a claim); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 (1974) (same).

The circumstances here are even more compelling. The Court of Appeals concluded that the Respondents had stated a claim under the Due Process Clause of the Fourteenth Amendment, specified the standards under which that claim is to be resolved, and remanded for further proceedings consistent with those standards. It did so, however, without reference to this Court's contrary decisions in *Roe, Menillo* and *Akron* or the uniform body of contrary decisional authority in state and lower federal courts. The Court of Appeals further did so without considering the utter anomalousness of its reliance on *Casey* – i.e., holding that a State may be precluded by the undue burden standard from requiring abortions to be performed by physicians notwithstanding the fact *Casey* found no impermissible burden in a statutory mandate that physicians give certain portions of a pre-abortion *advisement*. The lower court's ruling thus presents only a question of law and structures the remainder of the litigation in a manner clearly incompatible with settled, binding precedent. Review should occur now. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755 (1986) (finding appellate jurisdiction under 28 U.S.C. § 1254(2) absent because "the judgment is not final[ ] and . . . the case is remanded for further development of the facts" but nonetheless granting review by certiorari).

II. THE UNDUE BURDEN STANDARD ADOPTED IN *CASEY* DOES NOT LIMIT THE MONTANA LEGISLATURE'S AUTHORITY TO IMPOSE A PHYSICIAN-ONLY REQUIREMENT.

The Respondents contend that no decisions support "the proposition that a State, having once authorized a medically competent nonphysician to perform abortions, may subsequently withdraw that authorization solely to achieve the impermissible purpose, and with the unconstitutional effect, of making abortion less accessible to women." Opp'n at 19-20. Stripped of its rhetoric, therefore, the Respondents' position is that this Court's abortion-related decisions do not allow States to adopt legislation whose effect is to impose more stringent limitations on the performance of abortions without, at least potentially, running afoul of the undue burden standard in *Casey* – even though the restriction itself has been found by this Court to be constitutionally permissible.

The Respondents' theory ignores the fact that *Roe* and later abortion decisions by this Court have been directed at giving guidance to States about what is, and what is not, constitutionally permissible and thereby facilitating adoption of valid abortion-related statutes. Part XI of *Roe*, which "summarize[d]" and "repeat[ed]" the holdings in earlier sections of the opinion, thus referred to "the State" repeatedly, and it seems plain the Court meant not merely Texas but any State. 410 U.S. at 164-66. One of those holdings, of course, authorized statutes or regulations that limit performance of abortions to "a physician currently licensed by the State" and proscribe abortions by all others. *Id.* at 165. The joint opinion in *Casey* reiterated its fidelity with the "essential holding"

of *Roe*, 505 U.S. at 873, and nothing in the later opinion suggests that *Roe*'s approval of physician-only requirements was to be compromised by the undue burden standard. It is accordingly odd for the Respondents to contend the Montana legislature was disabled by that standard from imposing such a requirement merely because, in the past, one class of nonphysicians had been recognized by the Montana Board of Medical Examiners as statutorily eligible to perform abortions.

The oddness of the Respondents' position with respect to the Montana statute stems from an unwillingness to express forthrightly its fundamental predicate: *Any* State's physician-only requirement is subject to challenge under the Due Process Clause where a claim is made that certain types of abortions can be performed competently by nonphysicians and that the State's refusal to authorize such performance unduly burdens access to abortions. The actual breadth of their position is reflected in the assertions that "this Court has recognized that advances in medicine may result in invalidation of previously valid restrictions on abortion" and that *Roe* "did not anticipate that mid-level health care professionals would be utilized throughout the United States to work with physicians as physician extenders, performing a wide range of medical procedures and with authority to prescribe virtually any drug." Opp'n at 20-21.

What the Respondents miss, however, is that *Roe* established a per se rule permitting States to prohibit performance of abortions by nonphysicians because physicians reasonably may be assumed to be *most* competent to perform abortions. *Roe*, in other words, stands for the

proposition that such restrictions are inherently appropriate and need not be revisited whenever a nonphysician feels aggrieved by them. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Indeed, were the assumption untrue, there would be no reason for Respondent Cahill to be supervised by a physician like Respondent Armstrong – an "agency" relationship the Respondents agree must exist. Opp'n at 17 (contending that no decision of this Court "has approved the criminalization of abortion by a nonphysician under the direct supervision of a physician, and under the auspices of a state medical board, by a competent medical provider"); *see* Mont. Code Ann. § 37-20-101(c) (1995) (requiring physician named in physician assistant's utilization plan to "submit a statement to the board [of medical examiners] that he will exercise supervision over the physician assistant-certified in accordance with any rules adopted by the board and will retain professional and legal responsibility for the care and treatment of his patients"); *id.* § 37-20-403(1) ("[i]n establishing protocol, a physician assistant-certified must be considered the agent of the supervising physician with respect to all duties delegated to the physician assistant-certified under the utilization plan").[1] Logically extended, moreover, the

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[1] The Respondents remark that "[b]ecause Montana has, in its 1983 statute regulating physician assistants, elaborately set forth a definition of a physician's scope of practice that includes P.A.'s, it should not now be heard to argue that it has one definition of 'licensed physician' for a single doctor in the State – Dr. Armstrong – and another, broader definition that applies to the hundreds of other physicians in the State." Opp'n at 20. Although the precise import of this point is elusive, it is undisputed that Armstrong as a supervising physician is

Respondents' theory would make competency to perform an abortion an affirmative defense to prosecution under a physician-only statute – an unprecedented intrusion on the rights of States to control medical practice. *See, e.g., Spears v. Circuit Court*, 517 F.2d 360, 368 (5th Cir. 1975) (rejecting habeas corpus claim by midwife convicted for performing abortion); *Wright v. State*, 351 So. 2d 708, 711 (Fla. 1977) (affirming conviction of nurse under physician-only statute).

Finally, the Respondents have chosen to ignore the Petition's analysis concerning the rational basis standard applied by the *Casey* joint opinion when upholding Pennsylvania's requirement that certain portions of the patient advisement be given by a physician. 505 U.S. at 884-85. This silence is telling since there is simply no accommodating a result which permits a State to mandate that a physician be responsible for explaining, inter alia, "[t]he nature of the proposed procedure or treatment and of those risks and alternatives that a reasonable patient would consider material to the decision of whether or not to undergo the abortion" (18 Pa. Cons. Stat. § 3205(a)(1)(i) (1990)) and simultaneously prohibits a State from requiring that only a physician perform the ensuing abortion. Such a result would be even contrary to *Akron* which, after striking down a physician advisement requirement

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treated no differently than other supervising physicians under the challenged statute – i.e., no physician assistant can include within a utilization plan the performance of abortions. The challenged legislation, despite the Respondents' focus on Cahill, affects all physician assistants who may wish to perform abortions.

substantively identical to one later upheld in *Casey*, reiterated that "States may mandate that only physicians perform abortions." 462 U.S. at 447. The Respondents' position on the merits, like the Court of Appeals' decision, can be credited only if almost twenty-five years of precedent are placed aside.[2]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 1997

[2] As mentioned earlier, the Respondents devote far more attention in their opposition to the Bill of Attainder claim raised below than to the undue burden claim relied upon by the Court of Appeals in vacating the District Court's denial of a preliminary injunction. Opp'n at 21-27. The former claim, while appropriate for consideration by the Court of Appeals on remand if its judgment is reversed, is immaterial to the question presented. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992); *Wise v. Lipscomb*, 437 U.S. 535, 547 (1978).